No. 17-1272

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC., ET AL.,
Petitioners,

v.

ARCHER AND WHITE SALES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PROFESSOR GEORGE A. BERMANN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. A Columbia Law School faculty member since 1975, Professor Bermann teaches courses in, and has written extensively on, transnational dispute resolution (international arbitration and litigation), European Union law, administrative law, and WTO law. He is an affiliated faculty member of the School of Law of Sciences Po in Paris and the MIDS Masters Program in International Dispute Settlement in Geneva. He is also a visiting professor at the Georgetown Law Center.

Professor Bermann is an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the American Review of International Arbitration; and founding member of the governing body of the ICC Court of Arbitration and a member of its standing committee.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letter of petitioners and the blanket consent letter of respondent.

Professor Bermann is interested in this case because it presents a highly important but unsettled issue of domestic and international arbitration law relating to the application of the test in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), for determining whether parties have agreed to delegate to arbitral tribunals primary responsibility for determining arbitrability. The issue is whether incorporation of rules of arbitral procedure constitutes "clear and unmistakable" evidence, within the meaning of *First Options*, that the parties intended to withdraw from courts authority to determine the arbitrability of a dispute, on account of the fact that those rules, as in this case, contain a clause authorizing arbitrators to determine their own jurisdiction.

Although a majority of courts have found the incorporation of rules containing such a provision to satisfy *First Options'* "clear and unmistakable" evidence test, the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has concluded, after extended debate, that these cases were incorrectly decided because incorporation of such rules cannot be regarded as manifesting the "clear and unmistakable" intention that *First Options* requires. This case presents an opportunity to settle the meaning and application of the *First* Options test and thereby preserve the proper balance under federal law between the roles of courts and arbitrators in determining arbitrability.

SUMMARY OF ARGUMENT

This case involves the classic question of who has primary responsibility for determining arbitrability – a court or an arbitrator. Since this Court's decision in *First Options*, the law has been settled that "[t]he question of whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 77, 83 (2002) (internal citations omitted). What remains unsettled, however, is whether the incorporation in a contract of arbitral rules containing a provision empowering a tribunal to determine its own jurisdiction satisfies the "clear and unmistakable" evidence test.

The way the principal question in this case is presented simply assumes that the parties to the underlying contract entered into an "agreement delegating questions of arbitrability to an arbitrator." Pet. at I. More particularly, it assumes that, in adopting procedural rules recognizing the right of arbitrators to determine their own jurisdiction, the parties clearly and unmistakably agreed to delegate primary responsibility for determining arbitrability to the arbitrator in accordance with the requirements of *First Options*.

That assumption is incorrect. The incorporation of arbitral rules that – like the arbitral rules here – contain a simple provision empowering a tribunal to determine its own jurisdiction (known in international arbitration circles as a "competence-competence" clause) falls far short of establishing by clear and unmistakable evidence that the parties intended to withdraw from courts the authority to determine

whether an arbitration agreement was formed, whether the arbitration agreement is valid, and whether the dispute falls within the scope of that agreement – issues that this Court has termed "gateway" issues of arbitrability due to their fundamental importance in terms of party consent.

In this case, the Fifth Circuit properly found that the issue of arbitrability was for the court and not the arbitrator. However, it failed to base that conclusion on the ground that no delegation of authority had in fact been made. Instead, it decided this case on the basis of the "wholly groundless" doctrine, which assumes a valid delegation, but still permits a court to determine whether the dispute at hand manifestly falls outside the scope of the agreement to arbitrate.[2] Pet. App. 15a-16a.

This case thus presents the important question, that can only be resolved by the Court, whether incorporation by reference in an arbitration agreement of arbitral rules containing a competence-competence clause satisfies the requirement of clear and unmistakable evidence that the parties intended to delegate to the arbitrators primary authority to determine arbitral jurisdiction, within the meaning of *First Options*. Only this Court can conclusively resolve this

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[2] The Fifth Circuit adopted the two-step approach to the "wholly groundless" doctrine articulated by the Federal Circuit:

> That court set out a two-step process: (1) did the parties "unmistakably intend to delegate the power to decide arbitrability to an arbitrator; and if so, (2) is the assertion of arbitrability 'wholly groundless.'"

Douglas v. Regions Bank, 757 F.3d 460, 463 (5th Cir. 2014) (quoting *Agare Systems, Inc. v. Samsung Electronics Co.*, 560 F.3d 337, 340 (5th Cir. 2009)).

important question because it fundamentally implicates the standard adopted by the Court in *First Options*.

There is a genuine need for the Court to clarify whether the incorporation of arbitral rules satisfies the *First Options* test. Here, as in many cases, there is no express delegation provision in the arbitration clause, but only the incorporation of arbitral rules containing competence-competence language. The courts have reached different results in addressing the *First Options* issue that is presented here.

In this case the Magistrate Judge concluded that there was a valid delegation because the rules of the American Arbitration Association "very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules." Pet. App. 41a. The district court disagreed, finding that "there is no reason to believe that incorporation of the AAA rules . . . should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances." Pet. App. 34a. The Court of Appeals did not decide whether incorporation of the AAA arbitration rules in the parties' arbitration agreement constituted a clear and unmistakable delegation to the arbitrator, but instead invoked the "wholly groundless" doctrine, Pet. App. 10a-11a, which presupposes a valid delegation.

A majority of courts that have addressed the issue of whether the presence of competence-competence language in the arbitral rules adopted by the parties constitutes a proper delegation to the arbitrator have concluded, as has the Fifth Circuit, "that the express adoption of [the AAA Rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc. v. Dyn McDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir.

2012).[3] However, none of these decisions provides any reasoning whatsoever as to how or why incorporation of such arbitral rules meets the clear and unmistakable evidence test.

The ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration ("Restatement") has considered in depth the proposition that the presence of a competence-competence provision in the arbitral rules incorporated by reference in an arbitration agreement satisfies the *First Options* test, as well as the case law on which that proposition is based. The Restatement has concluded that the incorporation of arbitral rules like the AAA rules does not in fact constitute clear and unmistakable evidence of an intention to arbitrate arbitrability as required by *First Options*.[4]

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[3] *See, e.g., Oracle Am., Inc. v. Myriad Group, A.G.*, 724 F.3d 1069, 1074-1075 (9th Cir. 2013) (noting that the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability"); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (incorporation of AAA rules provides "clear and unmistakable evidence" that parties meant to arbitrate arbitrability); *but see, e.g., Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 n.1, 780 (10th Cir. 1998) (stating that arbitration agreement incorporating AAA rules did not indicate "a specific intent to submit to an arbitrator" the question of arbitrability); *Duthie v. Matria Healthcare, Inc.*, 535 F. Supp. 2d 909, 916 (N.D. Ill. 2008) (incorporation of AAA rules is not "clear and unmistakable evidence" of agreement to arbitrate arbitrability when arbitration clause does not provide for arbitration of all disputes).

[4] Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015) ("The Restatement rejects the majority line of cases as based on a misinterpretation of the institutional rules being ap-

In this case, the only basis on which the court below could find that there was clear and unmistakable evidence of an intent to withdraw from the courts authority to determine whether the dispute at hand falls within the scope of the parties' arbitration clause was the incorporation of arbitral rules containing "competence-competence" language. Since "competence-competence" language does not satisfy the *First Options* test of "clear and unmistakable" evidence, there was no proper delegation to an arbitrator of primary responsibility to determine arbitrability, and accordingly that issue remained primarily for a court to decide.

Therefore, although based on other grounds, the judgment of the Court of Appeals affirming the district court's decision to decide rather than delegate the question whether the claim in this case is arbitrable was correct under *First Options* and should be affirmed.

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plied. First, and most fundamentally, the rules do not purport to give arbitrators the exclusive authority to rule on the enforceability of the arbitration agreement. They make clear that arbitrators have the power to rule on such issues if raised before them, but they do not include language that excludes judicial authority over those issues.").

ARGUMENT

I. THE INCORPORATION OF ARBITRATION RULES CONTAINING "COMPETENCE-COMPETENCE" LANGUAGE DOES NOT CONSTITUTE THE CLEAR AND UNMISTAKABLE EVIDENCE OF AN INTENT TO ARBITRATE ARBITRABILITY REQUIRED BY *FIRST OPTIONS*

A. The *First Options* Test.

This case involves the threshold issue of who – court or arbitrator – has primary responsibility for deciding issues of arbitrability, including whether a claim comes within the scope of the parties' arbitration clause. Both courts and arbitral tribunals have a role to play in determining issues of arbitrability. In some cases, the issue of arbitrability is raised in a judicial proceeding to enforce an arbitration clause by compelling arbitration or staying a lawsuit in favor of arbitration. *See* 9 U.S.C. §§ 3-4. In other cases, the issue of arbitrability may be raised before the arbitrator as a defense to the arbitrator's jurisdiction and then later determined by a court in connection with judicial enforcement of the award. *See, e.g., First Options*, 514 U.S. at 941. In either situation, courts must determine who – court or arbitrator – has primary responsibility for resolving the parties' dispute as to arbitrability.

In *First Options*, this Court articulated the framework for determining whether a court or arbitrator had primary responsibility for determining certain gateway issues of arbitrability, such as "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 84.

The *First Options* framework turns on what the parties agreed about the allocation of authority to determine arbitrability. The key rule is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies*, 475 U.S. 643, 649 (1986). In other words, "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability'" unless "the parties clearly and unmistakably provide otherwise.'" *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 34, (2014) (internal citations omitted); *Howsam*, 537 U.S. at 83.

This Court has not addressed what specific language is necessary to constitute the clear and unmistakable evidence capable of overcoming the presumption that arbitrability is primarily for the courts. However, it has indicated that the language chosen must unambiguously establish the "parties' *manifestation of intent*" to withdraw from courts authority to resolve issues of arbitrability. *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

The kind of manifestation of intent that satisfies the clear and unmistakable evidence test is illustrated by the delegation clause in the *Rent-A-Center* case. There, the parties agreed that the "'Arbitrator, and not any federal, state or local court or agency, shall have *exclusive* authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement" (emphasis added). *Rent-A-Center*, 561 U.S. at 66. This delegation provision expressly addressed the role of both courts and arbitrators and clearly stated that the tribunal had not only primary, but indeed exclusive, authority to resolve issues of arbitrability. There

can be no doubt that the delegation language in *Rent-a-Center* was both clear and unmistakable.

B. The Competence-Competence Language in Arbitration Rules Does Not Reflect Clear and Unmistakable Evidence.

The language relied upon in this case to establish a delegation under *First Options* is dramatically different from the language in *Rent-A-Center*. The parties provided in their arbitration clause for binding arbitration "in accordance with the arbitration rules of the American Arbitration Association." JA 58. Rule 6 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), like most modern arbitral rules,[5] contains a competence-competence clause stating that the "arbitrator shall have power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." JA 79. In other words, the parties agreed to arbitral rules that confer power on arbitrators to decide their own jurisdiction.

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[5] *See, e.g.*, CPR Rules for Non-Administered Arbitration of International Disputes, art. 8.1 (Mar. 1, 2018) ("The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."); Rules of Arbitration of the International Chamber of Commerce, art 6(3) (Mar. 1, 2017) ("[A]ny question of jurisdiction ... shall be decided directly by the arbitral tribunal ..."); ICDR International Dispute Resolution Procedures, art. 19(1) (Jun. 1, 2014) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s) ..."); United Nations Commission on International Trade Law Arbitration Rules, art. 23(1), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to existence or validity of the arbitration agreement.").

However, there is no indication in Rule 6 that the conferral on arbitrators of authority to determine their jurisdiction divests courts of all authority to make that determination. Nevertheless, a majority of courts that have addressed this question have summarily concluded, as has the Fifth Circuit, that "the express adoption of these [arbitration] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc.*, 687 F.3d at 675.[6]

For several reasons, the courts drawing this inference are mistaken in doing so.

First, competence-competence language simply does not have the meaning attributed to it. It unquestionably authorizes an arbitral tribunal to resolve challenges to its own jurisdiction during the course of an arbitration, so that if its jurisdiction is challenged, it need not suspend proceedings and await a court determination of arbitrability; the tribunal may make that determination for itself. But competence-competence does not mean that a tribunal's jurisdiction to determine arbitrability is exclusive of a court's authority to do so, if so requested. Competence-competence has never been understood in U.S. law to render arbitral authority to determine arbitrability exclusive. Section 4 of the Federal Arbitration Act authorizes a court to compel arbitration "upon being satisfied that the making of the agreement for arbitration ... is not in issue." 9 U.S.C. § 4. Thus, the presumption is that courts have that authority – an au-

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[6] *See, e.g., Oracle Am., Inc.*, 724 F.3d at 1074-1075 (incorporation of UNCITRAL rules is "clear and unmistakable evidence" of intent to arbitrate arbitrability) *Awuah*, 554 F.3d at 11 (1st Cir. 2009) (same with respect to AAA rules). *But see Riley Mfg. Co., Inc.*, 157 F.3d at 777 n.1, 780 (stating incorporation of AAA rules did not evidence "specific intent" to arbitrate arbitrability).

thority that, under *First Options*, cannot in fact be withdrawn with anything less than "clear and unmistakable" evidence of an intention to that effect. U.S. law on the matter is different from the law of other countries, under which competence-competence is viewed as *both* vesting tribunals with authority to determine arbitrability *and* divesting courts of that authority.[7]

It is uncontroversial that under U.S. law competence-competence confers on arbitral tribunals an authority to determine arbitrability that is non-exclusive. Competence-competence does not acquire a different and much more far-reaching meaning merely because it is inserted into incorporated rules of arbitration, or indeed into an arbitration agreement itself. A competence-competence clause cannot constitute clear and unmistakable evidence of a delegation within the meaning of *First Options*.

Second, the decision in *First Options* makes it clear that reservation to courts of the authority to determine arbitrability is *the rule*, and that divesting it of that authority is *the exception*. That can no longer be the case if the mere inclusion of a competence-competence clause in the rules adopted by the parties is viewed as clear and unmistakable evidence under *First Options*. Competence-competence provisions are ubiquitous. They are found not only in many arbitration agreements, but in virtually all modern rules of arbitration and all modern arbitration laws. Very few international arbitrations are conducted in the ab-

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[7] *See generally* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257 (E. Gaillard & D. Di Pietro eds., 2008).

sence of a competence-competence clause. They have become, for all practical purposes, "boiler-plate." Thus, treating them as clear and mistakable evidence of an intention to delegate in effect makes delegation *the rule* and the court's right to determine arbitrability *the exception*.

Courts must not lightly find clear and unmistakable evidence within the meaning of *First Options*. It is fundamental that parties are not required to arbitrate without their consent. Arbitration's legitimacy depends on that.[8] It is because arbitrability questions so seriously implicate party consent that courts entertain challenges to arbitrability, including an assertion that the arbitration agreement to which a party subscribed does not encompass the dispute at hand.

The Restatement considered carefully the question whether the incorporation of competence-competence language, as here, constitutes clear and unmistakable evidence of an intent to withdraw courts' authority to determine arbitrability. The Restatement found that none of the decisions addressing this issue provides any meaningful reasoning as to how or why a competence-competence provision not only confers power on an arbitrator to determine arbitrability, but withdraws that power from the courts. The Restatement concluded after extensive debate that the majority of cases are incorrectly decided. "The Restatement rejects the majority line of cases as based on a misinterpretation of the arbitral rules" that were applicable in those cases.[9] The position taken by the Re-

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[8] *See* George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

[9] Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015).

statement has been finally approved by the ALI and is official.[10]

The Restatement's conclusion is based on all the considerations set forth above. By incorporating a competence-competence provision, institutional rules reaffirm the well-established proposition that tribunals enjoy authority to determine their own jurisdiction. That is what competence-competence means, and that is all it means, at least under U.S. law. It does not remove a court's authority to make that determination if asked to do so. The meaning of competence-competence does not change merely because it has been incorporated in arbitral rules.

First Options itself creates a strong presumption that courts have primary responsibility to determine arbitrability – a presumption that can only be overcome by clear and unmistakable evidence to the contrary. If ordinary competence-competence language found in all modern arbitral rules and all modern arbitration laws were sufficient to rebut the *First Options* presumption, that presumption would cease to exist.

In short, general competence-competence language cannot constitute the clear and unmistakable evidence required by *First Options*.

This is exactly as it should be. The *First Options* framework is meant to protect the integrity of arbitral proceedings by enabling courts to determine independently whether parties agreed to arbitrate. Issues of arbitrability, such as the question of whether the parties agreed to arbitrate a particular dispute,

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[10] *See Actions Taken at the 92nd Annual Meeting*, ALI, http://2015annualmeeting.org/actions-taken/ (last visited Sep. 24, 2018).

go to basic consensual nature of arbitration. The Court has stated countless times that because "'arbitration is a matter of contract ... a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Howsam*, 537 U.S. at 83 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). In *First Options*, this Court allowed parties, by way of exception, to delegate to a tribunal primary authority to determine whether the parties agreed to arbitrate a given dispute. But, precisely to ensure that consent of the parties is respected, the Court required a showing of that intention to be "clear and unmistakable." General competence-competence language, wherever found, cannot meet that test.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below holding that the issue of arbitrability was primarily for the court, although for reasons different than those relied on by the Fifth Circuit.

Respectfully submitted,

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